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Insurance News

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Modification of Expenses: McAteer v Glasgow City Council

This was a Court of Session personal injury action which settled at £6,500. The Defenders moved the court to modify the award of expenses.

Modification to the Voluntary Pre Action Protocol Scale

The first leg of the Defender's motion was to have the expenses modified to voluntary pre-action protocol expenses on the basis of premature litigation. The parties had been engaged in settlement negotiations pre-litigation and the Pursuer raised proceedings without notice whilst negotiations were ongoing (the parties were £3,250 apart but the Pursuer raised whilst the Defenders were considering the Pursuer's most recent settlement offer of £7,000).

Lord Boyd expressed sympathy for this motion but did not modify expenses to the pre-action protocol given liability had been disputed and there was no evidence that early settlement would have been achieved had the Pursuer's agents notified their intention to raise proceedings.

Modification to the Sheriff Court Scale

However, expenses were modified to the Sheriff Court scale. In doing so, Lord Boyd outlined a test to be applied by the court when considering a modification of expenses:

1. To consider whether in all the circumstances it was reasonable to raise the action in the Court of Session having regard to the value of the claim;
2. Consider any issues of novelty or complexity that might arise,
3. Consider any special circumstances that might pertain to the action and the cost of litigation in the Court of Session.

Lord Boyd modified expenses to the Sheriff Court scale without certification of Counsel on the following grounds:

- Any sum awarded was likely to be modest and in all probability in the region of £7,000 at most.
- No novel issue arose.
- Setting the value of the claim against the cost of litigation in the Court of Session there was no good reason why this case should not have been raised in the Sheriff Court.
- The precipitate way in which the action was raised.

Therefore, whilst this claim fell within the privative limit of the Court of Session, this was not the only relevant factor. The Court of Session will take into account a range of factors when considering the appropriate level of expenses including the conduct of the parties pre-litigation, the complexity of the claim and the nature of any pre-litigation settlement negotiations.

Angus Gillies agi@bto.co.uk

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A Walk in the Park?

Michael Leonard v. The Loch Lomond & Trossachs National Park Authority

The Facts

The Pursuer, who was 12 years old at the time of the accident, was hill walking with his family on the east shore of Loch Lomond. He walked ahead of his family following a path up the hill which turned sharply to its left on its final descent to the road below. He was found unconscious lying on his back on a road at the foot of the hill. He sustained several injuries.

The Pursuer's Case

The Pursuer alleged a breach by the Defenders of Section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

The Pursuer sought to prove that he tripped or lost his footing and fell from the path down a steep bank as a result of certain hazards and a lack of preventative measures put in place by the Defenders.

The Pursuer claimed that the steps on the path were uneven and inconsistent in shape. There were also tripping hazards and no barrier or handrail on the steps. The Pursuer could not remember anything about the accident and there were no direct witnesses.

The Decision

It was held that the Pursuer had failed to prove the mechanics of the accident. There was no evidence about precisely where any trip or fall occurred on the hill, whether it occurred on the path or what caused the accident. The precise circumstances remained a mystery and consequently the action had to fail.

Lord Uist then helpfully summarised the relevant authorities, considering what the position would have been had the Pursuer established the mechanics of the accident.

He noted that there was no duty upon an occupier of land to provide protection against obvious (or familiar) and natural dangers. (***Tomlinson v. Congleton Borough Council***, ***Fagan v. Highland Regional Council*** followed). The fact that the path was not a natural feature of the landscape, but a man-made one, made no difference.

Lord Uist adopted the approach taken by Lord Emslie in ***Graham v. East of Scotland Water Authority*** in relation to man-made or artificial features on land.

The path was a longstanding artificial feature, which was neither concealed nor unusual and did not involve exposure to any special or unfamiliar hazard. It had become a permanent, ordinary and familiar feature of the landscape, in respect of which, the Defenders owed no duty to the Pursuer or anyone else under the Occupiers' Liability (Scotland) Act 1960. There was no history of complaints about the path or any evidence of previous accidents.

Lord Uist went further than Lord Emslie and found that it was not a requirement that an artificial feature be well established or longstanding. It is sufficient that it is obvious, part of the landscape and does not involve exposure to any special or unfamiliar hazard.

The risk presented by the path in this case was a risk of tripping or slipping which must be taken to have been accepted by those venturing upon the hill. Lord Uist considered it to be contrary to common sense to expect the Defenders to provide protection to members of the public against such an obvious danger.

Note: The pursuer's indirect evidence regarding the mechanics of the accident was therefore insufficient. However, this claim would not have succeeded in any event. The Pursuer had accepted the risk and there was no duty to protect against such an obvious danger.

Angus Gillies agi@bto.co.uk

Swooped by a Seagull: Cathie Kelly v Riverside Inverclyde (Property Holdings) Ltd

In ***Cathie Kelly v Riverside Inverclyde (Property Holdings) Ltd*** **[2014] CSOH 86**, a project officer sued her employers and the owners of the building within which her office was situated for the sum of £30,000 when she was dive-bombed by a seagull. The Pursuer claimed to have exited the building, descended some steps and was "swooped" by a seagull. She ducked, turned round and fell as she tried to re-enter the building.

bto were involved on behalf of the employers and were successful in persuading the Pursuer that they ought to be released from the action at an early stage. The Pursuer continued her claim against the owners of the building to Proof.

Quantum was agreed prior to Proof and the matter restricted to liability. The Pursuer sought to rely upon section 2 of The Occupiers' Liability (Scotland) Act 1960 and Regulations 5 and 17 of the Workplace (Health Safety and Welfare) Regulations 1992.

In what he described as an "*interesting and unusual case,*" Temporary Judge Arthurson held that there was no evidence to link the bird that swooped towards the Pursuer to the specific building within which she worked. The Pursuer was the only witness to the event itself and, while wholly credible and reliable, even she could not place where the bird had come from. In the absence of such evidence, the Pursuer's claim was "*fundamentally misconceived*" and must fail.

In discussing the merits of the statutory cases brought and the evidence available, it was held that the Defenders had no knowledge of any previous "swooping" incidents and consequently the case under the Occupiers' Liability Act would fail due to lack of reasonable foreseeability.

The case under Regulation 5 of the Workplace (Health Safety and Welfare) Regulations would also fail as the regulation refers to maintenance, whereas the Pursuer's case was directed towards provision of preventative measures, construction of these measures and control of nests, rather than maintenance.

The Pursuer's case under Regulation 17 of the same 1992 Regulations would again fail on the fact that there was no link between the bird and the specific building. The Temporary Judge held that it was "*not feasible to consider the behaviour of wild creatures such as herring gulls in the context of Regulation 17 which addresses the organisation of a workplace*."

With quantum having been agreed at £7,000, this is arguably as good example as there may be of a case that should not have been taking up significant time in the highest civil court in Scotland. Temporary Judge Arthurson pithily referred to it as "*regrettable*" that it had done so.

Tim Webster twe@bto.co.uk

Update

The Courts Reform (Scotland) Bill successfully passed Stage 1 of the parliamentary process on 21 May 2014.

The Bill is now in to Stage 2 of the process and the Scottish Government have agreed to an amendment to reduce the proposed increase in the exclusive jurisdiction of the Sheriff Court from a figure of £150,000 to £100,000.

Stage 2 is expected to be completed by 27 June after which point it will move on to stage 3 for scrutiny by the whole Parliament, the last stage before the Bill is given Royal Assent.

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